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In The

Supreme Court of the United States

October Term, 1984

ROLAND G. HUEBNER, WILLIAM HUEBNER, and PETENWELL POTATO FARM,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE OF CALIFORNIA CATTLEMEN'S ASSOCIATION, NATIONAL CATTLEMEN'S ASSOCIATION, AGRICULTURAL COUNCIL OF CALIFORNIA, AND CALIFORNIA FARM BUREAU FEDERATION IN SUPPORT OF PETITIONERS' WRIT OF CERTIORARI

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INTEREST OF AMICI

Pursuant to Supreme Court Rule 36, California Cattlemen's Association, National Cattlemen's Association, Agricultural Council of California, and California Farm Bureau Federation respectfully submit this brief amicus curiae in support of petitioners' petition for writ of certiorari. Consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

The interests of amici are listed below:

A. National Cattlemen's Association

National Cattlemen's Association is a nonprofit corporation composed of 245,000 individual and 50 state association members, whose purpose is to protect the varied interests of farmers, ranchers, and breeders and owners of beef cattle through the cooperative promotion, fostering, and encouraging of intelligent and orderly marketing of agricultural and horticultural products. Members, many of whom farm and/or raise cattle throughout the United States and engage in wetlands agriculture, will be negatively affected by any interpretation of the agricultural, irrigation, or road building exemptions to the Clean Water Act, 33 U.S.C. § 1344(f)(1), that reduces the acreage available for new crop production, withholds exemption for wetlands irrigation with the structures it necessarily employs, or impinges upon day-to-day farm or ranch management decisions regarding the location of necessary service roads. These adverse effects will impact upon both the individual farms and ranchers as well as the National Cattlemen's Association itself, for the viability of the association is dependent upon that of its members.

B. California Farm Bureau Federation

The California Farm Bureau Federation is a voluntary nongovernmental, nonprofit California corporation. Its primary purpose is to protect and foster agricultural interests throughout the State of California. Its members consist of 52 county farm bureaus with a combined membership at the close of its 1984 membership year of approximately 98,000 farm families. Over 85% of all commercial farmers in the State of California are members

of the county farm bureaus. The agricultural regulations at issue in this case have a direct impact upon members of the federation as well as the federation itself.

C. California Cattlemen's Association

California Cattlemen's Association is a nonprofit California corporation composed of 3,952 voluntary ranch family members whose purpose is to promote, foster, and encourage the intelligent and orderly marketing of agricultural and horticultural products, particularly cattle and beef, through cooperation. Members, many of whom raise cattle in California and engage in wetlands agriculture, will be affected by any interpretation of the agricultural, irrigation, or road building exemptions to the Clean Water Act, 33 U.S.C. § 1344(f).

D. Agricultural Council of California

The Agricultural Council of California is a private association of farmer-owned and operated marketing, bargaining, and service cooperatives. Farmer-owners of the cooperatives, who are members of the Agricultural Council of California, engage in agricultural activities in wetlands areas. They will be affected by any interpretation of the agricultural, irrigation, or road building exemptions of the Clean Water Act, 33 U.S.C. § 1344(f), and regulatory applications of that Act.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 752 F.2d 1235 (1985).

A copy of that opinion is reproduced in the appendix to petitioners' petition for writ of certiorari.

STATEMENT OF THE CASE

In 1977 the Huebners purchased 5,000 acres of farmland which according to the Army Corps of Engineers (Corps) is wetlands.[1] Like all good farmers who wish to maintain economic viability in a time fraught with farmer bankruptcies, the Huebners seek to modernize their farming operation by altering crop patterns, intensifying irrigation activities, and generally upgrading the efficiency of the operation. When the Huebners first began to improve their farming operations after they purchased the new property in 1977 the Corps stepped in. Because the Corps believed these identified wetlands to be subject to its regulatory jurisdiction it attempted to regulate the Huebners' farming activities through the Section 404 permitting process. An initial consent decree requiring the Huebners to obtain a permit before engaging in any activity subject to the Corps' regulation was entered. After the decree was entered the Huebners, believing in good faith that certain farming activities were exempt from regulation by the Corps, proceeded for a time with these farming operations. In response to these activities the Corps brought the suit which is the basis of the Huebners' petition for writ of certiorari.

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[1] The Corps' definition of wetlands and the constitutional limits of the Corps' jurisdiction over nonagricultural wetlands are not at issue in this case.

SUMMARY OF ARGUMENT

1. The plain language of the Clean Water Act exempts from regulation activities such as those performed by the Huebners.

2. Congress intended the agricultural exemptions to the Clean Water Act to apply to a full range of agricultural activities.

I

INTRODUCTION

This case involves far more than the difficulties of a single Wisconsin farm family coping with the overly zealous enforcement of federal regulations where such regulations were never meant to apply. Rather, it involves the fate of farmers and ranchers throughout the nation who have already been harmed and who will continue to be harmed by another federal bureaucracy run amok. The Corps has crossed a line drawn by Congress designed to protect this nation's farmers and ranchers from an onslaughter of regulatory oversight and abuse; by crossing this line the Corps has invaded our agricultural industry in a way not intended and in fact strictly proscribed by Congress. This case presents an opportunity for this Court to enforce the wishes of Congress and end the Corps' regulatory invasion into the day-to-day activities of our farmers and ranchers.

The case of the Huebners is hardly isolated or alone. For example, at the present time another case in which the National Cattlemen's Association, California Cattlemen's Association, California Farm Bureau Federation,

and the Agricultural Council of California have all intervened is brewing in Northern California. It involves remarkably similar factual circumstances and an identically crabbed interpretation of the Clean Water Act's agricultural exemptions by the Army Corps of Engineers. That case, *United States v. Akers,* Civ. No. 84-1276-RAR (E.D. Cal. Jan. 15, 1985), is currently on appeal to the Ninth Circuit Court of Appeals, No. 85-1750 (filed March 7, 1985). With the *Huebner* case this Court has a chance to rectify the continuing regulatory transgressions of the Corps that can only become more egregious in their cumulative impact as the Corps' unauthorized regulatory reach becomes further institutionalized.

American farmers and ranchers are the backbone of this nation's economic prosperity. Farming and ranching, by their inherent nature, must alter the character and use of land, but the tremendous benefits derived generally far outweigh any concern over the conversion of undeveloped land into farm and ranchland, or as in this case the intensification of uses on underdeveloped land. However, it is also evident that undeveloped lands are crucial to the natural environment. For example, Congress recognizes the importance of natural wetlands for flood control, fisheries, and migratory bird populations. For this reason, Congress passed Section 404 of the Clean Water Act[2] to preserve and protect this country's wetlands. Congress was well aware, however, that an overbroad reading of the Clean Water Act could unjustifiably and adversely affect the ability of farmers and ranchers to carry on their day-to-day operations. Thus, Congress

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[2] Codified at 33 U.S.C. § 1344.

enacted a well-balanced statute that not only preserves the ability of farmers and ranchers to efficiently and independently manage their operations but also protects this nation's wetland environments to the maximum extent practical. It is this crucial balance that is at stake in this and similar lawsuits.

What is most troubling to amici in the *Huebner* case is the District Court's interpretation of the agricultural exemptions to Section 404 of the Clean Water Act as upheld by the Seventh Circuit Court of Appeals. It is clear that the court's interpretation totally emasculates the effectiveness and purpose of these exemptions and is unequivocally contrary to the plain language and legislative intent of the Clean Water Act. Because the proper interpretation of the agricultural exemptions to the Clean Water Act is crucial to the viability and efficiency of so many American farms and ranches, amici take this opportunity to briefly explain the applicability of these agricultural exemptions and the crucial importance for this Court to restore the regulatory balance designed by Congress.

II

THE PLAIN LANGUAGE OF THE CLEAN WATER ACT EXEMPTS FROM REGULATION ACTIVITIES SUCH AS THOSE PERFORMED BY THE HUEBNERS

Section 404(f) of the Clean Water Act, codified at 33 U.S.C. § 1344(f), provides an exemption for a range of farming, silviculture, and ranching activities from the regulatory jurisdiction of the Army Corps of Engineers. Section 404(f) reads in relevant part:

"(f)(1) Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material—

"(A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;

. . . .

"(C) for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches;

. . . .

"(E) for the purpose of construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized;

. . . .

is not prohibited by or otherwise subject to regulation under this section or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions under section 1317 of this title).

"(2) Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section."

A. All Normal Farming Activities Are Exempt from Corps' Regulation

Section 404(f)(1)(A) exempts normal farming and ranching activities from the Corps' regulatory jurisdiction. The subsection also lists certain specific activities as being within this exemption. However, because the list is preceded by the words "such as" the list is not exclusive. What is relevant is whether or not the Huebners' activities constitute "normal farming." No allegations have ever been advanced that the activities of the Huebners were for any purpose but normal farming. The area is not being converted into a housing development, golf course, or shopping center; the present and anticipated future use is for farming and only farming.

The regulations promulgated by the Army Corps of Engineers for this exemption, 33 C.F.R. § 323.4 (1984), and proposed regulation 33 C.F.R. § 232.3, located in 49 Federal Register 39,019 (1984), help define the scope of normal farming activities. Specifically, they are required to be "part of an established (*i.e.*, on-going) farming, silviculture, or ranching operation." It is undisputed that the Huebners' property has been farmed since the turn of the century. The activities of the Huebners will not bring any previously unfarmed area into a new farming use; the activities will only modernize and intensify the farming uses of the property. The regulations continue that an operation "ceases to be established when the area on which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operations." 33 C.F.R. § 323.4(a)(1)(ii) and proposed 33 C.F.R. § 232.3(c)(1)

(ii)(A), (B) in 49 Fed. Reg. 39,019. Because there have been farming operations since the turn of the century and only the character of the operations is changing after a period of exclusive use for cranberry production it is clear that this regulation's limitation upon the normal farming exemption does not apply, even if the hydrological regime had been altered. Any reading that the regulations prevent crop intensification activities such as those engaged in by the Huebners is clearly contrary to the plain language of the "normal farming" statutory exemption.

It is submitted that the Corps must adhere to the plain language of the statute and regulations.

B. The Irrigation Ditch Exemption Applies to Irrigation Ditches and Appurtenant Structures

Section 404(f)(1)(C) exempts the construction or maintenance of irrigation ditches. An irrigation ditch encompasses more than a mere ditch but also includes the raised bank of a ditch or those appurtenant structures that bring the water out of the ditch or spread the water delivered by the ditch. This exemption must cover the full scope of irrigation utilized in farming activities including the necessity of placing material extracted from an irrigation ditch on either a levee or leveled site adjacent to the ditch, as is the normal and economical farming practice. *See* Booher, *FAO Agricultural Development Paper No. 95, Surface Irrigation: No. 9 Wild Flooding* (United Nations Food and Agricultural Organization 1974); Hansen, Israelsen, Stringham, *Irrigation Principles and Practices* at 199-206, 240-41, 250-51 (4th ed. 1980); and Marr, California Agricultural Extension Service, *Grading Land*

for Surface Irrigation 1-46 (Its Cir. 438) (1954); *see also* proposed regulation 33 C.F.R. § 232.3.3 found in 49 Fed. Reg. 39,019 (structures appurtenant to irrigation ditches to be exempt from regulation).

C. Road Building for Farm Purposes Is Exempt

The Huebners have been found in violation of the Clean Water Act and not within the road building exemption of Section 404(f)(1)(E) because their roads were built at a "greater width than necessary." 752 F.2d at 1243. This is patently absurd and plainly contrary to the language of Section 404(f)(1)(E). The roads were built with material removed for the expansion and maintenance of irrigation ditches. This material must be placed somewhere, and it is clearly a wise management practice to use it in building adjacent roads. The Corps seeks to extend its regulatory jurisdiction over the day-to-day ditch and road maintenance and building activities with the bizarre requirement that farmers must adopt uneconomic management activities by shipping such soil removed from irrigation ditches to points unknown. This makes no economic or environmental sense and is hardly what Congress intended.

D. Section 404(f)(2) Does Not Negate the Exemptions Because the Huebners Are Not Bringing the Subject Property into a New Use

Section 404(f)(2) of the Clean Water Act states that the exemptions outlined in Section 404(f)(1) do not apply when there is a "discharge of dredged or fill material . . . incidental to any activity having as its purpose bringing an area of the navigable waters *into a use to which it was*

not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced." (Emphasis added.) The Corps believes that this section is invoked when an irrigation spoils bank is enlarged. It is doubtful Congress intended such an interpretation. Even if it is assumed that the Corps' and the lower court's findings are correct that the activities of the Huebners serve to reduce the reach of the subject wetlands identified by the Corps, the normal farming exemption still must apply because the activities of the Huebners do not change the use of the subject wetlands. They have been and shall continue to be subject to the use of farming. The property has always been used for farming, and most likely it always shall be used for farming. Thus, all of the activities of the Huebners fall squarely within the agricultural exemptions of the Clean Water Act. However, contrary to the intent of Congress the Corps would sacrifice sound and economic principles of farm management for what can only be described as a stifling devotion to the expansion of its regulatory domain.

III

CONGRESS INTENDED THE AGRICULTURAL EXEMPTIONS TO THE CLEAN WATER ACT TO APPLY TO A FULL RANGE OF AGRICULTURAL ACTIVITIES

Although the plain language of the exemptions to the Clean Water Act leaves little ambiguity it has been argued by the United States that they do not encompass a full range of normal farming activities and furthermore that the legislative history of the amendments to the Clean

Water Act demonstrates that the exemption must be so narrowly construed that only a bare minimum of farming-related activities will be tolerated by the Corps. However, when the entire legislative history is examined, it becomes abundantly clear that Congress had every intention to exclude all normal farming activities from the regulatory domain of the Army Corps of Engineers. Furthermore, it is apparent that the activities of the Huebners fall well within the congressional intent.

When Congress enacted the Clean Water Act in 1972 it extended the jurisdiction of the Army Corps of Engineers from navigable waterways to further include all those waters affecting navigable waterways, including wetlands. Soon thereafter the Corps began to promulgate regulations which would have extended its regulatory control into the day-to-day activities of all farming in wetlands areas and even those areas that were merely farmlands with high seasonal saturations.[3]

In response to the Corps' attempt to expand excessively its jurisdiction under the 1972 Clean Water Act,

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[3] During the Senate debate over the 1977 Amendments to the Clean Water Act Senator Muskie stated:

> "The corps proceeded to take [the Clean Water Act] and . . . expand it far beyond any intent of the Congress so that it found itself threatening regulation in areas of the country which the corps had never imagined it had any jurisdiction over.
>
> "We all began to get letters from farmers, foresters, ranchers, from people whose activities in the mind of Congress were not in the slightest bit intended to be affected . . . ." See Environmental Policy Division of the Congressional Reference Service, *A Legislative History of the Water Pollution Control Act Amendments of 1972* at 948 (Comm. Print 1973) (*Legislative History*).

Congress in 1977 passed the Section 404(f) exemptions which are the subject of this lawsuit. The intent of these exemptions clearly was to remove the Corps' regulatory jurisdiction from normal farming activities. Even with the proposed exemptions, however, there remained a certain amount of wariness of the Corps among many members of the Senate. Led by Senator Bentsen these members attempted to pass an additional amendment to the Clean Water Act which would have removed all wetlands entirely from all regulation. It is most telling to note that during the debate over Senator Bentsen's amendment, the Senate was repeatedly assured that the Section 404(f) exemptions alone would relieve farmers from the type of excessive regulatory jurisdiction that the senators were concerned with, and that all parties in this case are concerned with.

For example, in introducing the amendment that would have excluded wetlands from Clean Water Act regulation Senator Bentsen stated:

> "I find it offensive that before a small farmer can dig new irrigation ditches he must first write the U. S. Army for permission, complete the necessary Federal forms, and then wait an average of 125 days while his request is shuffled from one bureaucrat's in-box to another. I also find it offensive that a farmer who has paid hard-earned money for new land 2 years ago may now be prohibited by the Government from improving that land for agriculturally productive uses, and will not receive a penny in just compensation for his loss of income from the property." *Legislative History* at 905.

In response, Senator Bentsen was assured that the proposed Section 404(f) exemption alone would free

farmers from excessive government regulation. As Senator Hart stated, the exemption "does exempt activities which are normal farming or agricultural activities, run by individuals or family farmers." *Legislative History* at 907-08. *See also* Remarks of Senator Stafford at 912 and Remarks of Senator Baker at 922 ("the committee's amendment [Section 404(f)] has responded to this confusion and makes it clear, for example, that normal farming, silviculture and ranching activities such as plowing, cultivating, seeding, harvesting, upland soil and water conservation practices and minor drainage are excluded from section 404 altogether").

Despite these reassurances there was still some uneasiness by some senators. Senator Domenici, in support of Senator Bentsen's amendment, stated:

> "I think we have an opportunity here in the Senate to undo something that has grown up that we really never intended, and not to continue to ignore the fact that we never intended under section 404 that the Corps of Engineers be involved in the daily lives of our farmers, realtors, people involved in forestry, anyone that is moving a little bit of earth anywhere in this country that might have an impact on navigable streams. We just did not intend that.
>
> . . . .
>
> "We exempt ordinary farming, but farming should not have been involved to begin with. So *the farmer still does not know whether his activity is normal or not.*" *Legislative History* at 924 (emphasis added).

Senator Hart reassured Senators Domenici and Bentsen that the proposed Section 404(f) exemptions would cover farmers. Senator Hart stated:

> "Every proposal before this Senate, every one, is designed to exempt those normal activities from that kind of overregulation by the Corps of Engineers or anybody else. Any argument that is made on the floor to the contrary simply misrepresents one or the other of the proposals upon which we will be asked to vote before this debate is over.
>
> . . . .
>
> "The committee amendment [Section 404(f)] also specifically exempts the construction and maintenance of agricultural irrigation ditches and the maintenance of agricultural drainage ditches." *Legislative History* at 928.

The debate continued. Senator Dole stated that "[w]ithout this [the Bentsen] amendment, our farmers and ranchers and others could be subjected to unnecessary bureaucratic harassment." *Legislative History* at 938. Once again the senators were reassured that the Section 404(f) exemption protected the farmers although the Corps should continue to have jurisdiction over wetlands because without that jurisdiction there would be "an open invitation for the dredgers of this country to find wetland areas for the disposal of their contaminated waste and spoil. If we adopt the [Bentsen] amendment, that is what will happen." Legislative statement of Senator Muskie, *Legislative History* at 940. Despite the misgivings of the senators who wished to pass the Bentsen amendment the Senate ultimately decided that farmers would be fully protected by the Section 404(f) exemptions. The Bentsen amendment was not passed.

This legislative history is highly relevant to the proper interpretation of Section 404(f). In this debate it is clear that normal day-to-day farming activities, such as

crop rotations, or increasing efficiencies or modernizations of farmland were to be covered under the Section 404(f) exemptions. If there had been any credible evidence that normal farming activities such as those conducted by the Huebners were not to fall within the exemption then the Senate would not have passed the exemptions without further modifications. Instead, the exemptions were passed in their present form because the senators believed that the Section 404(f) amendment completely precluded the Army Corps of Engineers from asserting its jurisdiction over the lives of America's farmers.

It should be further noted that Section 404(f) (2) was intended only to preclude the change from an agricultural use into some other use under the guise of "farming activities" and was not intended to affect change *among* farm uses. Section 404(f) (2) was most certainly not intended to preclude the changing of one crop to another crop. The Senate had no intention of forever preventing farmers from engaging in necessary and essential crop rotations or intensifications of existing agricultural uses. In fact, the only time the Senate debated the subject of "bringing an area of the navigable waters into a use to which it was not previously subject," Section 404(f) (2), the senators mentioned only a conversion of agricultural or silvicultural uses into nonagricultural or nonsilvicultural uses. For example, in the Senate debates it was stated by Senator Stafford that "permit review is necessary for discharges to convert a hardwood swamp to *another use* through construction of dikes or drainage channels." *Legislative History* at 913 (emphasis added).

Finally, it should be noted that the House of Representatives also believed that the agricultural exemptions would be applied to a broad range of farming activities. In the House debate of April 5, 1977, on H.R. 3199 a nearly identical agricultural exemption was debated. The agricultural exemption Section 404(h), *reprinted in Legislative History* at 1240, was the subject of the comments of representatives Harsha and Cleveland who stated that "[t]his procedure would exempt by statute *virtually all agricultural operations* by straight exemption of a list of specific activities from any requirement for any permit whatsoever." *Legislative History* at 1265 and 1298 (emphasis added). Any agricultural activities not covered by the new exemptions were to be covered by blanket permits. *Id.* at 1265 and 1298. The final version as reached in conference committee is nearly the same, except that more activities were included in the exemption and Section 404(*f*) (2) was incorporated to prevent abuse of the exemptions.

Congress did not intend to permit the Corps to regulate such activities as those of the Huebners. Congress did not intend to allow the intrusion of federal regulation into the day-to-day activities of this nation's farmers. Rather, Congress intended to prevent the wholesale pollution or alteration of this nation's wetlands by industrialists or developers who were not engaging in legitimate farming or silvicultural activities. Because all of the activities on the Huebners' farm were crucial functional elements of their agricultural work, because they do not involve the conversion of farmland into nonfarm uses, and because there is no credible factual evidence that

these activities fall outside of the exemptions, the decision below cannot stand.

CONCLUSION

Isolated farming activities in a remote and rural region of Wisconsin should not, under normal circumstances, be the subject of Supreme Court deliberations. However, when a powerful federal agency wanders from the proper bounds of its jurisdiction into the field of day-to-day agricultural activities, contrary to congressional intent, the propriety of that agency action must be reviewed. The necessity of Court review is especially manifest when the agency abuse is not a mere incident of isolated overzealousness, but rather is symptomatic of a disturbing pattern of regulatory abuse throughout the nation.

In 1977, Congress exempted agricultural activities from regulation by the Army Corps of Engineers. The Corps has ignored the unambiguous meaning and intent of this exemption. Rather the Corps has proceeded to extend its regulatory grip over agricultural activities without respite and without any but the most crabbed, unreasonable, and untenable interpretation imaginable of Congress' exemption language.

It is respectfully urged that the Huebners' petition for a writ of certiorari be granted.

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Respectfully submitted,

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